Supreme Court, U.S.
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NO. 88-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND ITS LOCAL 5-857,
Petitioners,

v.

CONOCO INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER A LABOR ARBITRATION AWARD WHICH HAS NO FOUNDATION IN THE EXPRESS LANGUAGE OF THE LABOR AGREEMENT AND WHICH IS IN DIRECT CONFLICT WITH THE COMMON LAW OF THE SHOP MAY BE JUDICIALLY VACATED.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties. However, pursuant to Rule 28.1, the Respondent, Conoco Inc., advises the Court that it is a wholly owned subsidiary of Du Pont Energy Company which is a subsidiary of E. I. du Pont de Nemours and Company. Additionally, appended to this brief is a listing of subsidiaries or affiliates, other than wholly owned subsidiaries, of the Respondent.

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STATEMENT OF THE CASE

For as long as the parties can remember, Conoco has had established Rules of Conduct with regard to its refinery employees. Such plant rules are delivered to refinery personnel at the time of their employment and are periodically published at conspicuous locations throughout the refinery. Since at least May of 1976, Conoco's Rules of Conduct have included a prohibition against "the violation of any criminal law or the com-

mission of any other offense involving moral corruption, (including physical attack on other employees), stealing or making fraudulent records". For the same period of time, the Rules of Conduct have provided that "severity of discipline will be determined by the nature and frequency of the infraction and may include termination". The Union has never challenged, grieved, protested or filed a complaint about the reasonableness of the content of the above-quoted provisions.

On August 30, 1985, law enforcement officers conducted a search of an old barn located at the residence of Mr. Allen Streeter, an employee at Conoco's Ponca City, Oklahoma refinery. The officers found a very substantial amount of tools and equipment, much of which bore identification markings of Conoco or its contractors. The officers loaded a portion of the tools and equipment which could be identified as belonging to Conoco or its contractors onto a large moving van and inventoried the contents of the van. The inventory contained a long list of many items including the following:

13 tool boxes
10 electric hand grinders
10 levels
7 chain hoists
6 shovels
4 ladders
4 wheelbarrows
4 orange Gott watercoolers
4 hydraulic pumps
4 drills
4 doubledeck tool cabinets (with tools inside)
4 bolt cutters
3 hydraulic jacks
3 sledgehammers

2 cutting torches
2 bandsaws
1 drill press
1 hydraulic wench
1 portable generator
Assorted scaffolding
A pile of miscellaneous power tools

Streeter was arrested and convicted of knowingly concealing stolen property. When Streeter's employment was terminated for theft of Conoco's property, the Union filed a grievance challenging the existence of just cause for the discharge. At the arbitration hearing, all of the uncontroverted facts were presented to the arbitrator, including the facts that Streeter had engaged in theft of Conoco property repeatedly during virtually all twenty-three (23) years of his employment and that Streeter had personally stolen many of the numerous items recovered from his residence.

Nonetheless, the arbitrator found that Streeter should be reinstated and the discharge set aside. The arbitrator found that theft of company property is normally a "discharge offense". However, the arbitrator found that the company's past practice of assessing only suspensions for theft-related incidents precluded Streeter's discharge. The arbitrator reasoned that:

> [t]he Employer must treat all employees equally. If theft is a discharge offense, it must be equally applied to all employees.

The arbitrator felt Streeter was treated unequally based upon the treatment of three other refinery employees. First, on December 23, 1976, an employee was given a three week suspension without pay for attempting

to steal a few extensions of pipe from the refinery. Secondly, in December of 1980, another employee was suspended without pay for four weeks due to the "suspicious circumstances" surrounding his possession of nine cases of Conoco motor oil worth approximately $216.00. Finally, on October 10, 1984, another employee was given a ten day suspension without pay for stealing a pair of coveralls and some office supplies. i.e., notepads, binder clips and index cards.

Conoco petitioned the district court to vacate the award on the grounds that the arbitrator had not confined himself to interpretation of the agreement, but had "dispensed his own brand of industrial justice". The Union counterclaimed for enforcement of the award. All facts were stipulated. The trial court vacated the award and the Tenth Circuit affirmed.

SUMMARY OF THE ARGUMENT

The decision of the Tenth Circuit is not in conflict with this Court's precedent. This Court continues to recognize that an arbitrator's award will be judicially vacated when an arbitrator does not limit himself to interpretation of the labor agreement, but instead undertakes to dispense his own brand of industrial justice. The language of the arbitrator's opinion in this case plainly discloses that his award was founded upon his own notions of industrial fairness, rather than upon an interpretation of the agreement between the parties.

Moreover, this Court has consistently acknowledged that an arbitrator may not ignore the plain language of the contract. In the instant case, however, the arbitrator ignored the express terms of the contract and the reasonable, unambiguous, undisputed, long-standing and well publicized rules of the shop. It has been uniformly held by the Courts of Appeal that such expressions of the law of the shop are essential guidelines which may not be ignored by a labor arbitrator, but must be accepted, respected and enforced. Such a rule is not only compatible with, but compelled by, this Court's own pronouncements.

The Tenth Circuit affirmed the trial court in this case because of an irreconcilable conflict between the arbitrator's rationale and the collective bargaining agreement, including the law of the shop, as established by the undisputed facts. Such holding is wholly in accordance with the principles announced in *United Paperworkers v. Misco, Inc.*, 484 U.S. ____, 108 S. Ct. 364 (1987). An arbitrator must stay within the bounds of the parties' agreement, rather than create new rules or terms not bargained for by the parties. Accordingly, the Union's Petition for Writ of Certiorari should be denied.

ARGUMENT

The Tenth Circuit's decision does not deviate from the decisions of this Court in *United Paperworkers v. Misco, Inc.*, 484 U.S. ____, 108 S. Ct. 364 (1987), *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) and *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). This Court has long recognized that labor arbitration is a matter of contract and that the parties have bargained for the arbitrator's interpretation of their contract, not for his own notions of industrial fairness. Therefore, in *Enterprise Wheel,* this Court stated that:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
>
> 363 U.S. at 597.

This principle was reaffirmed in the recent *Misco* decision:

> As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice.
>
> 108 S. Ct. at 378.

In the present case, the arbitrator, by his own words, clearly manifested that his decision was based upon his

own notion that all employees must receive the same class of penalty, either discharge or suspension, for the same offense. Such principle has no foundation in the agreement itself. The arbitrator made no pretense of interpreting or construing any provision of the collective bargaining agreement in support of such conclusion. Moreover, such concept is in direct conflict with the long-standing Rules of Conduct adopted at the refinery. Said Rules provide that stealing may be punished by termination and that severity of discipline will be determined by the nature and frequency of the infraction. Clearly, the Rules of Conduct anticipate that employees will be treated differently, even for the same rule violation, where there is a significant disparity in the nature and frequency of the infractions.

The Tenth Circuit was therefore justified in finding that the arbitrator:

> . . . based his decision on a principle not found anywhere in the agreement or in the industrial common law when he stated employees must be treated equally, regardless of the severity or frequency of the offense. In his decision, the arbitrator recognized that the theft in this case was 'over a much longer period of time and amounts to much larger monetary value.' No one disputes the arbitrator's findings of fact. The essence of his ruling, however, in light of the facts is that an employer who fails to discharge one employee for a minor infraction under suspicious circumstances is estopped from discharging an employee for serious and continuous violations of a company rule prohibiting stealing. We find no rational support in the express terms of the contract or in the industrial common law for such a conclusion. The agreement vests in the management sole responsibility for discipline and discharge for just

> cause. Pursuant to this authority, the management implemented specific rules of conduct. The arbitrator had no authority to ignore these specific rules of conduct and, instead, imposed a contrary all-or-nothing rule of discipline. The arbitrator derived his decision from a policy or body of thought outside the contract, rather than from the agreement and the existing industrial common law. The arbitrator, therefore, exceeded his authority.

Reversal of labor arbitration awards which ignore or conflict with reasonable, unambiguous, undisputed, long-standing and well publicized plant rules in favor of the arbitrator's own theory of industrial equity is not in disregard of this Court's prior decisions, but is compelled by them. This Court has established that a collective bargaining agreement calls into being a new common law—the common law of the particular industry or of a particular plant. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). Furthermore, this Court has long recognized that a collective bargaining agreement is not an ordinary contract, but a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966). As was stated in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960):

> There are too many people, too many problems, and too many unforeseeable contingencies to make the words of the contract an exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to 15 or even 50 pages. Within the sphere of collective bargaining, institutional characteristics and the governmental nature of the collective bargaining process

> demand a common law of the shop which implements and furnishes the context of the agreement.
>
> . . .
>
> The labor arbitrator's source of law is not confined to express provisions of the contract as the industrial common law—the practices of the industry and of the shop—is *equally* a part of the collective bargaining agreement though not expressed in it. (Emphasis supplied)
>
> 363 U.S. at 579-82.

Therefore, the Tenth Circuit's holding that Conoco's Rules of Conduct "are essential guidelines to determine whether the arbitrator based his award on an interpretation of the contract or instead founded the award on some body of thought, feeling, policy or law that is outside the contract" is wholly consistent with this Court's precedent, as well as decisions among the various circuits. See *International Association of Heat and Frost Insulators v. General Pipe Covering, Inc.*, 792 F.2d 96 (8th Cir. 1986); *Trailways Lines, Inc. v. Trailways Lines Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986); *Clinchfield Coal Co. v. United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983); *Norfolk Shipbuilding and Drydock Corp. v. International Brotherhood of Boilermakers*, 671 F.2d 797 (4th Cir. 1982).

The Union's reliance upon *Misco* is misplaced. In *Misco*, the gravamen of the employer's complaint was that the arbitrator had "grievously erred" in making his findings of fact. In this case, the facts were undisputed. The arbitrator unmistakably established that Streeter had engaged in substantial and habitual thievery in violation of the long-standing company rule making theft a basis for termination. Unlike *Misco*, Conoco does

not predicate its complaint upon "improvident" or "silly" fact finding. Instead, Conoco objects to the arbitrator's plain disregard for the collective bargaining agreement and the accompanying law of the shop in order to apply his own unique brand of industrial justice.

The principles repeated in *Misco* do not undercut the Tenth Circuit's decision, but support it. *Misco* does not abrogate the principles established by the landmark *Steelworkers Trilogy* and its progeny. *Misco* reiterates that a labor award must be based upon an interpretation of the agreement of the parties and may not be either contrary to or in disregard of the same. Thus, since *Misco,* the Courts of Appeal have continued to grant judicial relief from arbitration awards which find an absence of just cause for discharge where the alleged offense is clearly found to have occurred and the contract specifies that such offense is grounds for termination. *S.D. Warren Co. v. United Paperworkers,* 845 F.2d 3 (1st Cir. 1988); *S.D. Warren Co. v. United Paperworkers,* 846 F.2d 827 (1st Cir. 1988).

CONCLUSION

The decision of the Tenth Circuit is in full accord with the rulings of this Court. Considered as a whole, the arbitrator's opinion clearly demonstrated that the arbitrator was not confining himself to interpretation of the contract, but was importing to the agreement principles outside the parties' agreement which were only a product of his own notions of industrial fairness. The principles imported by the arbitrator have no relation to the language of the parties' agreement and are diametrically opposed to the common law of the shop

established between the parties over the course of their long-term bargaining relationship. The Tenth Circuit properly affirmed the vacation of the arbitrator's award by the trial court.

Conoco respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

This is to certify that on this _____ day of January, 1989, I mailed a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the following persons with proper postage prepaid thereon:

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_____

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APPENDIX

Respondent's List of Subsidiaries (Other than wholly owned) and Affiliates

S — Subsidiary
A — Affiliate

Big Sky of Montana Realty, Inc. (S)
Cit-Con Oil Corporation (S)
Coman I Limited (S)
Coman II Limited (S)
Coman III Limited (S)
Conch International Methane Ltd. (S)
Du Pont Scandinavia AB (A)
AB Branslecentralen (A)
ARA AB (A)
ARA Fotogenservice AB (A)
ARA Gavele AB (A)
ARA Jonkoping AB (A)
ARA Norrkoping AB (A)
ARA-bolagen (A)
Conara AB (A)
Jet Trading AB (A)
Maxi Benzin AB (A)
Svenska Petroleumlagring (A)
Svenska Kol ARA Aktiegolag (A)
Varmacenter Sven Maijer AB (A)
Conoco El Hamma (Tunisia) Ltd. (A)
Conoco Iraq Ltd. (A)
Conoco Kayes (Congo) Ltd. (A)
Conoco Kouilou (Congo) Ltd. (A)
Conoco N'dombo (Gabon) Ltd. (A)
Conoco Yemen (Aden) Ltd. (A)
Conoco Yemen (Sanaa) Ltd. (A)
EXEL Limited (A)
Oil Insurance Ltd. (A)
OK/Co-op (S)

APPENDIX (continued)

T.A.L. (Aus.) (S)
T.A.L. (It.) (S)
ACE Limited (A)
Conoco Cabinda (Angola) Ltd. (A)
Conoco Mbassi (Gabon) Ltd. (A)
Conoco Onango (Gabon) Ltd. (A)
Conoco South Umbarka Ltd. (A)
Conoco Spain Ltd. (A)
EEL Limited (A)
Conoco Buton (Indonesia) Ltd. (S)
Conoco Cegonha (Angola) Ltd. (S)
Louisiana Carbon Company (A)
Conoco Dabaa (Egypt) Ltd. (S)
Khalda Petroleum Co. (A)
Conoco Faghur Ltd. (S)
Geisum Oil Co. (A)
Conoco Exploration, Ltd. (A)
Continental Oil Limited (A)
Societue du Pipeline Sud-Europeen SA (A)
T.A.L. (Ger.) (A)
K/S Statfjord Transport A.S. & Co. (A)
Statfjord Transport A.S. (A)
Colonial Pipeline Company (A)
Milne Point Pipe Line Co. (A)
Dixie Pipeline Company (A)
Explorer Pipeline Company (A)
Lake Charles Pipe Line Company (A)
Pioneer Pipe Line Company (A)
Platte Pipe Line Company (A)
Yellowstone Pipe Line Company (A)
Conoco North Ras Qattara Ltd. (S)
Conoco North Sitra Ltd. (S)
Conoco South Spain Ltd. (S)
Conoco (U.K.) Limited (S)
Associated Petroleum Terminals Ltd. (A)
Benzene Marketing Co. Ltd. (A)

APPENDIX (continued)

BT&D Technologies Ltd. (A)
Cliffe Storage Ltd. (A)
Crude Oil Terminals (Humber) Ltd. (A)
Humber Oil Terminals Trustee Ltd. (A)
Petroleum Storage Ltd. (A)
Warwickshire Oil Storage Ltd. (A)
Conoco Warim Ltd. (S)
Conoco West Ras Qattara Ltd. (S)
Oasis Oil Co. of Libya, Inc. (A)
Societe de Financement Dela Route Tahoua 'Ariit (A)
Felix Oil Company (S)
Jupiter Chemicals, Inc. (S)
Kettleman North Dome Assoc. (S)
Long Beach Oil Development Company (S)
NISCO (S)
Oberrheinische Mineraloelwerke GmbH (OMW) (S)
Petco Enterprises Ltd. (S)
Petrocokes, Ltd. (S)
Petroleum Terminals, Inc. (S)
Iranian Investment Corp. (A)
Iranian Oil Participants Ltd. (A)
Iranian Oil Services (Holdings) Ltd. (A)
Iricon Agency, Ltd. (A)
The Standard Shale Products Company (S)
Tidelands Royalty Trust (S)
Boise Industrial (S)